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CITATION

Statute:

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 764

MILTON THEODORE SHAFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 62-64) is reported at 179 F. 2d 929.

JURISDICTION

The judgment of the Court of Appeals was entered January 12, 1950 (R. 64-65), and a petition for rehearing was denied March 20, 1950 (R. 65). The petition for a writ of certiorari was filed April 19, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether the count of the indictment under which petitioner was convicted charged all the elements of the offense prescribed by the statute under which it was drawn.

STATUTE INVOLVED

Section 2 of the act of February 9, 1909, c. 100, 35 Stat. 614, as amended, 21 U.S.C. 174, provides:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

The first count of a three count indictment filed in the United States District Court for the Southern District of California (R. 2-5) charged that on or about September 23, 1948, petitioner and two other defendants, in violation of 21 U.S.C. 174,

"did receive, conceal, and facilitate the transportation and concealment, after importation, of a certain narcotic drug, namely: approximately 227 grains of heroin, which said heroin, as the defendants then and there well knew, had been imported into the United States of America contrary to law" (R. 2-3). Prior to the introduction of the evidence, the trial court granted judgments of acquittal in respect of counts 2 and 3 on petitioner's motion that they did not state offenses under the laws of the United States (R. 6, 50, 54),[1] but overruled an identical objection to count one (R. 6, 50). The jury found petitioner guilty on that count (R. 7) and he was sentenced to pay a fine of $5,000 and stand committed until such fine is paid and to imprisonment for one year, but the execution of the imprisonment sentence was suspended and he was placed on probation for three years (R. 16).

ARGUMENT

Petitioner's sole contention is that the words "fraudulently or knowingly" in the first *disjunctive* clause of 21 U.S.C. 174 denouncing the unlawful importation of narcotic drugs apply as well to the acts of receiving, concealing and facilitating the transportation and concealment of unlawfully imported narcotics which are denounced in the sec-

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[1] Count 2 charged the defendants with knowingly purchasing heroin which was not in or from the original stamped package and count 3 charged a conspiracy knowingly to import heroin from Mexico into the United States (R. 3-5).

ond clause, and that the first count of the indictment was fatally defective because it failed to allege that the defendants "fraudulently and knowingly" received, etc., the heroin, but alleged only that they received it knowing that it had been imported contrary to law. The Court of Appeals rejected this contention and another not renewed here and dismissed the appeal as frivolous (R. 62-64).

The Court of Appeals was unquestionably right, since the statute clearly defines two categories of offenses: (1) importations of narcotics contrary to law and (2) dealing in such drugs after importation. The words "fraudulently or knowingly" define only the scienter required to bring an importation contrary to law within the proscription of the first clause. The second clause contains its own requirement of scienter, i.e., "knowing the same to have been imported contrary to law." The statute is aimed not only at unlawful importations, but at trafficking in narcotics imported in violation of law. It reaches not only the importer, but others who deal in narcotics illegally brought into the United States. Because of the differences in the two types of offenses, it was natural for Congress to prescribe knowledge of the unlawfulness of the importation as an element of the offense of importing and to require only knowledge that the drug had been brought in contrary to law as an element of the offenses denounced in the second clause. These differences in respect of the scienter required are

unambiguously reflected in the structure of the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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